91-1894

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JEFFREY BYRD,
Petitioner

-against-

THE STATE OF NEW JERSEY,
Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED

1. Does the Defendant-petitioner's Constitutional Right to Free Speech as set forth in Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 292 L.Ed. 2d 284 (1971), and Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed. 2d 408 (1972), protect him from an unlawful arrest as a result of his exercise of his Right of Free Speech and establish his right to use necessary force to repel the unlawful arrest?

2. Does the Due Process Clause of the Fourteenth Amendment give the defendant a right to use force to repel an unlawful arrest by a police officer similar to the right to use force to resist an unlawful arrest set forth in Bad Elk v. United States, 177 U.S. 529, 537 (1900); and U.S. v. DiRe, 332 U.S. 581, 594 (1947)?

3. Does the defendant's Fourteenth and Fourth Amendment Rights to be free of unreasonable restrictions of his liberty

protect him from prosecution for simple assault of a police officer where the defendant used force to repel an unlawful arrest and unlawful use of force by a police officer?

4. Does the Fourteenth Amendment protect against the prosecution and conviction of the defendant for simple assault of a police officer where the police misused State power to unlawfully arrest and use violent force on the defendant?

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a) The decision of the New Jersey Supreme Court denying defendant's petition for Certiorari
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b) The decision of the New Jersey Superior Court Appellate Division affirming the conviction
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c) The decision of the New Jersey Superior Court Law Division affirming the conviction below
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d) The decision of the Municipal Court of the Borough of Rumson New Jersey convicting defendant
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STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a decision of the Supreme Court of New Jersey entered on February 6, 1991. Petitioner has challenged the validity of a statute as being repugnant to the Constitution of the United States. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

The Petition involves the following Amendments to the United States Constitution:

1) The First Amendment: FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2) The Fourth Amendment: SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

3) The Fourteenth Amendment: PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Petition involves the following New Jersey Statutes:

1) N.J.S.A. 2C:12-1 - ASSAULT

a. Simple Assault. A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent in which case it is a petty disorderly persons offense.

b. Aggravated assault. A person is guilty of aggravated assault if he:

(1) Attempts to cause serious

bodily injury to another or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life reckless causes such injury; or

(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or

(3) Recklessly causes bodily injury to another with a deadly weapon; or

(4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in section 2C:39-1f., at or in the direction of another whether or not the actor believes it to be loaded; or

(5) Commits a simple assault as

defined in subsection a. (1) and (2) of this section upon

(a) Any law enforcement officer acting in the performance of his duties while in uniform or exhibiting evidence of his authority; or

(b) Any paid or volunteer fireman acting in the performance of his duties while in uniform or otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or

(c) Any person engaged in emergency first-aid or medical services acting in the performance of his duties while in uniform or otherwise clearly identifiable as being engaged in the performance of his duties while in uniform or otherwise clearly identifiable as being engaged in the performance of emergency first-aid or medical

services; or

(d) Any school board member or school administrator, teacher or other employee of a school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a member or employee of a school board.

Aggravated assault under subsection b. (1) is a crime of the second degree; under subsection b. (2) is a crime of the third degree; under subsection b. (3) and b. (4) is a crime of the fourth degree; and under subsection b. (5) is a crime of the third degree if the victim suffers bodily injury, otherwise it is a crime of the fourth degree.

c. A person is guilty of assault by auto when the person drives a vehicle recklessly and causes either serious bodily injury or bodily injury to another. Assault

by auto is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results.

d. A person who is employed by a facility as defined in section 2 of P.L. 1977, c. 239 (C.52.27G-2) who commits a simple assault as defined in paragraph (1) or (2) of subsection a. of this section upon an institutionalized elderly person as defined in section 2 of P.L. 1977, c. 239 (C.52:27G-2) is guilty of a crime of the fourth degree.

2) N.J.S.A. 2C:29-2. RESISTING ARREST; ELUDING OFFICER

a. A person is guilty of a disorderly persons offense if he purposely prevents a law enforcement officer from effecting a lawful

arrest, except that he is guilty of a crime of the fourth degree if he:

1. Uses or threatens to use physical force or violence against the law enforcement officer or another: or

2. Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance.

b. Any person, while operating a motor vehicle on any street or highway in this State, who knowingly flees or attempts to elude any police or law enforcement officer after

having received any signal from such officer to bring the vehicle to a full stop is a disorderly person.

3) N.J.S.A. 2C:33-2. DISORDERLY CONDUCT

a. Improper behavior. A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he

(1) Engages in fighting or threatening, or in violent or tumultuous behavior; or

(2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

b. Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer

or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highway, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

STATEMENT OF THE CASE

This case involves a brutal beating of Jeffrey Byrd, a citizen of the State of New Jersey, at the hands of police officers employed by the municipality of Sea Bright, New Jersey, while they were on duty and under the color of state authority. The police officers in question arrested Mr. Byrd (who had committed no offense), used unlawful force to deprive him of his liberty and, while he was handcuffed, beat him in the face with a night stick, requiring reconstructive facial surgery, leaving him with permanent injury.[1]

The case is presented to this Court on petition for certiorari because the State of New Jersey convicted Mr. Byrd of two separate

[1] After the record was closed in the New Jersey courts, it was discovered in the Fall of 1990 that Mr. Byrd also had a displaced disc in his neck at the C5, C6 which temporarily paralyzed his legs. This condition was corrected by open surgery on his neck, but the prognosis is that he will have some neurological impairment.

offenses based upon the allegations of the police officers that Mr. Byrd, after the illegal arrest and the unlawful use of force, deprivation of his liberty, and while handcuffed behind his back, in "resisting arrest" assaulted two of the three armed police officers. In short, the State of New Jersey's response to an illegal arrest of one of its citizens, the unlawful deprivation of his liberty, and the unlawful use of brutal force resulting in his hospitalization, was to charge and convict the innocent victim of a crime while permitting the police to act with impunity.

The New Jersey statutes, as construed and applied by the New Jersey courts in this case are unconstitutional because they are in contravention of the due process clause of the 14th Amendment of the United States Constitution.

THE FACTS

Jeffrey Byrd was a 27 year old single male who lived with his parents in Fair Haven, N.J. in January, 1988 (3T 139-19 to 140-23; 3T 136-7 to 137-21; 3T129-19 to 130-1). On the evening of Saturday, January 2, 1988, Mr. Byrd, and the young woman who he had been dating, Grace O'Donnell, went, with a few acquaintances, to Sea Bright, New Jersey, to a commercial establishment known as "The Trade Winds" which provided entertainment and dancing. They arrived at The Trade Winds after they had been socializing at a friend's home, arriving at approximately 11:30 p.m. to 11:45 p.m. on January 2. Mr. Byrd and Miss O'Donnell were there for approximately one hour when they left The Trade Winds to retire for the evening after having said good bye to their acquaintances. (3T 140-1 to 142-23; 3T 192-1 to 19).

It was when Mr. Byrd left The Trade Winds that police officers from the Borough of Sea

Bright arrested him without cause, restrained him, handcuffed him, and struck him in the face with a night stick resulting in severe fracture of multiple bones of the face, dislodging six teeth and causing eye injury. Mr. Byrd had left the main entrance of The Trade Winds with Grace O'Donnell only. At the main entrance (which faced in a southerly direction), there was a ramp to the parking lot. As Byrd descended, he saw several bouncers. Byrd had asked what was "going on" since there was a fellow in the center of the bouncers. As he was standing in the group with the bouncers, a police car pulled up at the bottom of the ramp and two police officers exited the car. One police officer went up the ramp and grabbed Byrd by the arm (this officer was later identified as Officer Sorrentino). The officer did not tell Byrd why he was accosting him and restraining him. As he was led down the ramp, Mr. Byrd asked the police officer "what the problem was". According to Byrd, the police

officer said nothing all the way down the ramp to the police car, at which time Byrd protested that he hadn't done anything wrong. Byrd again asked Sorrentino "what is the problem" to which he received no response. At that point, the police officer had Byrd face the car and he placed him in handcuffs. (3T 142-18 to 146-3; 3T 193-10 to 204-7)[2]

Having been led down the ramp by Officer Sorrentino, and repeatedly asked why he was being detained and arrested without the officer giving an explanation, Byrd found himself pushed against the car, handcuffed. His girlfriend, Grace O'Donnell had become hysterical.

Partly out of fear, partly out of frustration of the officer refusing to tell him

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[2] Although the police officers' testimony on some points differed from that of Byrd and O'Donnell (The officers' shifting testimony is referred to below), all of the police who testified acknowledged that there was no factual basis for Byrd's arrest and that he was placed in handcuffs after he was detained, and forcibly placed in a police car.

what was happening, partly from a sense of outrage that he had been unlawfully arrested and his liberty forcefully taken, Byrd looked over his shoulder to the arresting officer and asked him if he was "an asshole". Upon hearing this, the officer swung Byrd around so that he could face him and confronted him. He asked what Byrd had said. At that point, Byrd became fearful for his safety and denied making the comment. Byrd thereafter said nothing further to the officer.

According to Byrd the whole atmosphere was tense. He was apprehensive and fearful because he hadn't gotten a response from the officer, his girlfriend was upset, he was handcuffed and now there was this confrontation with the police officer with Byrd in handcuffs with his arms behind his back. As he was facing the police officer, he felt a blow strike him on the left side of his face. Mr. Byrd had no recollection of seeing the blow or where it came from. He immediately lost his vision.

As his vision started coming back to him, he saw a person coming at him again in a low stance with his hands out. He did not know or recognize who it was and instinctively put his leg up out of fear that he was about to be struck again. He put his leg up a second time and remembers nothing further until he regained consciousness in the parking lot of the police department. (3T 145-19 to 151-4) According to Grace O'Donnell she saw them put Byrd in the police car and she was transported directly to the police headquarters in a separate vehicle. When she saw him in the jail cell at the police station, "he was a mess" and she "didn't even recognize him". (3T 214-7 to 23; 3T 207-14 to 208-7; 3T 208-19 to 210-21)

The blows sustained by Byrd left him not only unconscious at times, but hazy and semi-conscious when he did regain his senses. He could remember standing in his cell at the police headquarters and became conscious of the fact that he was missing several teeth. He

then realized where he was and had some recollection what had happened at The Trade Winds. (3T 151-11 to 152-5) Byrd has no recollection of his being transferred by ambulance to Riverview Hospital and arriving at the hospital. (3T 152-21 to 153-7)

The record before this court is not complete with respect to the injuries sustained by Mr. Byrd as a result of the beating of him by the Sea Bright Police Department. The trial court refused, throughout the record, to permit testimony concerning the nature of the injuries. The court also denied admitting the hospital records into evidence. (See, 3T 154-7 to 24; 3T 124-2 to 125-4)

The records were marked for identification (See, 3T121-9 T.122-25) and they are found in the Lodgings, pages 1a to 61a. The records reveal that Mr. Byrd sustained severe facial fractures requiring facial reconstruction, eye damage (the records do not reveal the later development that Mr. Byrd's vision in his left

eye became permanently impaired) and the loss of numerous teeth, together with various bruises, cuts and hematomas. The transcript that is before the court is a transcript of the proceedings against Byrd in which the police officers charged him with assaulting the police officers. The trial judge steadfastly ruled that injuries to Byrd were totally irrelevant in the simple assault case and resisting arrest against Byrd.

An examination of the hospital records reveal that Mr. Byrd underwent surgery on January 7, 1988 in Riverview Hospital to repair fractures to the zygoma and zygoma arch. Mr. Byrd had also sustained fracture of the inferior orbital rim on the left side of his face. The zygomatic arch was depressed. There were other fractures and there was a opacification of the left maxillary antrum. (See, Lodgings, pages 1a to 9a) The pathology report indicates that evidence of both bone and teeth of zygomatic and alveolar origin was

included in the residual of the operation.

This case, in short, involves a resident of New Jersey, Jeffrey Byrd, who committed no crime, who was illegally arrested, unlawfully restrained, upon whom force was used to place him in handcuffs and deprive him of his liberty, and who wound up in the hospital requiring significant facial surgery. As a result of this incident, the State of New Jersey chose to prosecute Mr. Byrd, not the police officers. During the course of the prosecution of Mr. Byrd, the State of New Jersey ruled it was irrelevant to admit evidence concerning Mr. Byrd's injuries, and convicted the innocent victim of police brutality of an assault because the police alleged that while Byrd was handcuffed, he kicked a police officer.

CHARGES AGAINST MR. BYRD IN PROCEEDINGS BEFORE THE GRAND JURY

As a result of the incident of the early morning hours of January 3, 1988, two of the police officers signed complaints against Jeffrey Byrd charging him as follows:

1. An aggravated assault upon Police Officer Steven Spahr in violation of N.J.S.2C:12-1(b)(5)(a) and the indictable offense of purposely preventing a lawful arrest in violation of N.J.S. 2C:29-2; (Lodgings at page 62a).

2. Pursuant to Complaint No. W566153, Mr. Byrd was accused of an aggravated assault upon Patrolman John Sorrentino and also preventing Sorrentino from

effecting a lawful arrest, both violations pursuant to the same statutes cited in the Spahr complaint above; (Lodgings at 63a).

3. Mr. Byrd was charged with under Complaint No. S9632970 with the disorderly persons offense of "yelling offensive language in a public parking lot" pursuant to New Jersey Statute 2C:33-2(b). (See, Lodgings at 62a).

Those complaints were prepared and signed on the day Mr. Byrd was admitted to Riverview Hospital. Subsequent to Mr. Byrd being discharged from the hospital, he filed aggravated assault complaints against both police officers, Mr. Spahr and Mr. Sorrentino. All of the matters were consolidated for

presentation before the Monmouth County Grand Jury. During the Grand Jury proceedings, the prosecutor who charged the law to the jury failed to discuss the consequence of the arrest being lawful or unlawful and allowed the jury to deliberate in the absence of such a charge. As a result of the grand jury action, the complaint signed by Byrd against two police officers were dismissed completely while the indictable offenses against Mr. Byrd were downgraded to disorderly persons offenses of simple assault, resisting arrest and using offensive language in a public place. The matter thereafter proceeded before a municipal court judge sitting without a jury and was tried on two separate dates, July 12, 1989 and August 30, 1989. The municipal court judge proceeded on two counts of simple assault (a disorderly persons offense pursuant 2C:12-1), two charges of resisting arrest (a disorderly persons offense pursuant to 2C:29-2). One complaint signed by Officer Sorrentino against

Byrd pursuant to N.J.S.2C:33-2(b) (using offensive language in public).

The pertinent portions of N.J.S.2C:29-2(a) states as follows: a person is guilty of a disorderly persons offense if he purposely prevents a law enforcement officer from effecting a lawful arrest, except ..."it is not a defense to a prosecution under this section that the law enforcement officer was acting unlawfully in making the arrest, but provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance."

The portion of the statute relating to the offensive language pertinent hereto reads as follows: N.J.S.A. 2C:33-2(b)

> Offensive Language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in

> reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive of language, ...

THE SHIFTING VERSION OF FACTS ALLEGED BY THE POLICE OFFICERS

The material aspects of Mr. Byrd's version of the incident of January 2 and January 3 necessary for the disposition of the issues presented by this Petition for Certiorari are corroborated in all material respects by the police officers themselves. Although there are some differences in the testimony and allegations of the police officers when compared with all aspects of the Byrd and O'Donnell testimony, the differences are unimportant for our purposes here. In fact, the incredible nature of the police officers' testimony and their numerous and shifting versions (to analyze the inconsistent and conflicting versions of the police officers'

testimony one must compare the Grand Jury testimony with the police reports and the versions given at trial before the municipal court).

However, the important facts for the purposes of this Petition are corroborated by the police officers in all versions as follows:

1. Byrd was arrested and placed in handcuffs essentially the way that Byrd testified;

2. There is no allegation that Byrd committed any offense or crime prior to his being placed in handcuffs and being deprived of his liberty;

3. The police officers, in fact, struck Mr. Byrd in the face with a night stick while Mr. Byrd was in handcuffs (although the version of how this occurred differs) and they employed the liberal use of a night stick in striking or "poking" Mr. Byrd in and around his chest and abdomen while attempting to force him into a police vehicle and thereafter attempting to force him to sit up once he was actually in the police vehicle.

One difference in Byrd's version of the events and that of the police officers is that the police officers assert a disorderly persons offense as the original justification for having arrested him. An offense that was unconstitutional and found to be so. The police officers had conducted a subsequent investigation following the arrest of Mr. Byrd, which included the participation of the Chief of Police. That investigation revealed that Mr. Byrd was not involved in any altercation prior to the arrest.

Subsequently, the police officers filed the disorderly persons offense under 2C:33-2 charging Mr. Byrd with using offensive language. Whether this charge was simply a cover up or not, it clearly could not form the basis for an arrest because it was not a legal or lawful charge. The municipal court judge, prior to taking proofs, dismissed the complaint because the statute in question had (a number

of years earlier) been found to be in violation of the 14th Amendment to the Federal Constitution bringing New Jersey law in line with the case law of the United States Supreme Court (decisions having been rendered as much as seven years before the date of the Byrd incident). The municipal court judge dismissed the disorderly persons offensive language offense under N.J.S.A.2C:33-2(b) based upon the case law finding the statute unconstitutional. (See, 2T 8-2 to 10-23)

By the State's own admission, there was no offense committed by Byrd prior to his being illegally arrested, deprived of his liberty, illegal force used to restrain him and placed in handcuffs. There are contradictory versions of what happened thereafter. The police claim that Byrd kicked a police officer after he was handcuffed and that the use of the billy club was to force him into the car and later, while he was in the car, to force him to sit up straight. According to Byrd, after he was

illegally restrained and placed in handcuffs he received a blow to the left side of his face. To the extent that it is relevant to the success of this Petition, the version that was advanced by the police officers couldn't possibly be given credibility to an objective finder of fact.

The severe damage done to Mr. Byrd's face extended from his left eye all the way down to his mouth where six of his teeth were dislodged and removed. An accidental strike in the face (which is the version the police offer) could not have done that kind of damage if the club was used in the way that the police officers suggest (poking in the chest and in the ribs). The trial judge wasn't very helpful in his rulings to sort out the truth of the facts because he didn't believe that the injuries to Mr. Byrd were relevant to any facts before him (this despite the fact that it was a necessary element of the offense against Mr. Byrd that Mr. Byrd's force was unnecessary to

protect himself).

PROCEDURAL HISTORY AND ACTION TAKEN BY THE NEW JERSEY COURTS

Perhaps the worst injustice against Jeffrey Byrd concerns the actions taken by the New Jersey court system. Although he was a victim of police brutality, he was further victimized by the court system which treated him as the criminal (instead the police who committed the crimes) and convicted the innocent victim of having assaulted the two police officers.

After the grand jury remanded the matter to the municipal court to be tried on the five disorderly persons offenses, the municipal court judge dismissed the offensive language charge. Thereafter, the matter was tried on July 12, 1989 and August 30, 1989 by a judge specially assigned to hear the matter in the Rumson Municipal Court (the judge sitting in Sea Bright, New Jersey, having disqualified

himself because of the nature of the case). It was contended by the defendant, Mr. Byrd, throughout the proceedings, that the arrest was unlawful and, therefore, he was free to use whatever force was necessary to defend himself from the illegal use of the police force in depriving him of his liberty, assaulting him by grabbing him, assaulting him by placing him in handcuffs, and forcibly stuffing him into a police vehicle to transport him for incarceration.

The municipal court judge found Mr. Byrd not guilty on the charge by Officer Spahr that Mr. Byrd prevented a lawful arrest. He was also found not guilty of preventing a lawful arrest as charged by Patrolman Sorrentino. Mr. Byrd was found guilty on both assault counts signed by Patrolman Spahr and Patrolman Sorrentino against Mr. Byrd. The municipal court made no findings of fact, but simply resolved the matter in favor of the police officers on the simple assault charges.

On the complaint (W566152) signed by Patrolman Spahr, a fine of $200.00 was imposed with costs and penalty charges of $80.00. On the complaint filed by Patrolman Sorrentino, the court fined Mr. Byrd $150.00 with costs and penalty charges of $50.00. (See, 3T 274-13 to 277-21).

The matter was appealed to the Law Division of the Superior Court for a trial de novo where the convictions of the municipal court were affirmed (See, Appendix A at 52). Thereafter, Mr. Byrd appealed to the Appellate Division of the Superior Court of New Jersey which also affirmed the convictions (See, Appendix B at 54). Finally, the Supreme Court of New Jersey on February 6, 1991 filed an Order denying Mr. Byrd's Petition for Certification. (See, Appendix D at 60).

THE FEDERAL QUESTIONS PRESENTED

Prosecution and convictions of Jeffrey Byrd violated at least three of his

constitutional rights when the State's action in prosecuting him and the statutes used were unconstitutional on two separate grounds. First, the use of force against Byrd in securing his person, handcuffing him and violently forcing him into a police car violated his Fourteenth and First Amendment rights of free speech since the arrest was initially designed, according to the police officers, to interfere with his rights of free speech (as ultimately determined even by the municipal court judge).

Byrd's use of force, which was the basis of the simple assault convictions, was to protect his person (as Byrd asserted) not designed to resist the arrest (as contended by the police officers). The state courts ruled that Byrd had no right to physically defend himself in resisting the arrest even though the arrest was unlawful. The argument that was advanced to the municipal court judge and based upon Byrd's federal constitutional rights of

free speech derived from the First Amendment through the 14th Amendment. All arguments advanced by the defendant throughout the case hinged upon the arrest being unlawful for federally constitutional reasons and his right to use force was dependant thereon. The argument advanced by counsel cited a case that was based upon the federal constitutional law set forth in opinions of the United States Supreme Court. All arguments in the case were based upon this initial premise.

The case that actually cited on record, In the Interest of H.D. 206 N.J. Super. 58 (App. Div. 1985) was a case relying upon two United States Supreme Court decisions, Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed. 2d. 408 (1972) and Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d. 284 (1971). A subsequent New Jersey Supreme Court case which brought New Jersey law in line with the Supreme Court decisions in Gooding and Cohen as well as the Appellate Division

decision In the Interest of H.D. specifically recites that New Jersey courts overruled their previous decisions concerning the offensive language statute in New Jersey to reflect the decisions of the United States Supreme Court. See, In the Interest of H.D., 206 N.J. Super. at 60 (See, transcript in this case 2T8-2 to 10-23).

The unconstitutional nature of the state prosecuting Byrd for simple assault under the facts of this case all flowed from the undeniable fact that the arrest was unlawful based upon the federal decisions finding the offensive language statute to be in violation of the Fourteenth Amendment. Thereafter, and throughout the case on all levels the unlawfulness of the arrest was the touchstone of all arguments concerning the state's inability to prosecute Byrd for having used some force to resist the arrest. The state court having recognized their inability to prosecute Byrd for the offensive language

surprisingly circumvented the federal constitutional question by prosecuting him for using a modicum of force in an attempt to protect himself during the illegal arrest that flowed therefrom. If the State of New Jersey construed its statutes as giving it authority to prosecute and convict Byrd for using mild resistance to an unlawful arrest, it was a direct (or at the very least indirect) violation of the same 14th Amendment rights of Byrd that formed the basis for the dismissal of the offensive language complaint.

Although connected thereto, there is a separate liberty interest of Byrd that was violated when police officers used force to deprive him of his liberty. This argument was contained in all of defendant's arguments that the arrest was unlawful and although the state court, in reaching its decisions, used the construction of the state statute to justify the prosecution and conviction of Byrd, they necessarily disposed of federal questions in

doing so because by implication they ruled that the arrest was "lawful" or that Byrd had no constitutional right to use any force whatsoever when police officers used force against him. Under the reasoning of Beck v. Alabama, 447 U.S. 625, 646-647 (1980), there has been preserved a federal question in this case to give the court jurisdiction.

The unlawfulness of the arrest, a broad term, included the constitutional arguments. When the New Jersey courts affirmed the convictions, they construed in the New Jersey simple assault statute, N.J.S.A.2C:12-1(a), to mean that a citizen cannot use any force against a police officer arresting the citizen even if there was no underlying legal basis for the arrest.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION THAT, WHEN STATE POLICE OFFICERS FALSELY ARREST AN INDIVIDUAL AND THE ARREST IS BASED UPON THE DEFENDANT'S CONSTITUTIONALLY PROTECTED EXERCISE OF HIS RIGHT OF FREE SPEECH, THE ARREST IS UNCONSTITUTIONAL AS BEING IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS, AND THE STATE MAY NOT PROSECUTE AND CONVICT THE DEFENDANT FOR USING FORCE WHICH IS NO GREATER THAN THAT NECESSARY TO PROTECT HIMSELF AND TO REPEL THE FORCE USED BY THE POLICE OFFICERS AND THE DEPRIVATION OF HIS LIBERTY. THERE ARE ALSO OTHER IMPORTANT FOURTEENTH AMENDMENT RIGHTS IMPLICATED IN THIS CASE.

This case implicates serious constitutional considerations for all citizens of this country. It can resolve, once and for all, the question of whether we are all free of living in the fear of police state tactics and whether the lofty promise of our constitution to protect our liberty is given true meaning on the streets of this nation.

In appearance, it is a humble municipal court case, but in reality, it presents questions of significance. It presents the paradox of the State prosecuting an innocent victim and giving new meaning to the phrase

"insult to injury". It is representative of the worst kind of injustice: that police officers who hold the public trust of protecting the law themselves become unlawful - and the courts, the true trustees of justice, compound the original injustice by calling the victim the criminal and the criminals the victim.

There is no other court in which Jeffrey Byrd can seek relief from this injustice. There would seem to be few better pursuits by this Court than to clarify the constitutional issues that are implicated by this case. What meaning could be given to this Court's decisions in Gooding v. Wilson[3] and Cohen v. California[4], which protect free speech, if a police officer can deprive a citizen of his liberty when he exercises the rights that are

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[3] 405 U.S. 518, 92 S.Ct.1103, 31 L.Ed.2d. 408 (1972).

[4] 403 U.S. 15 91 S.Ct. 1780, 29 L.Ed. 2d 284 (1971).

expounded in those cases, and when a citizen objects, the police officer is free to beat him unconscious and inflict injury of such severity to require hospitalization and reconstructive surgery? And what meaning is given to the Fourth Amendment promises to be free and secure in your person (applicable to the State through the Fourteenth Amendment) if police officers are free to arrest individuals and use all the force that is necessary to implement the arrest and to give force to their resolve in seeing an innocent citizen incarcerated, even where that resolve leaves him permanently injured and maimed?

There is a need for the Supreme Court of United States to review this case and these issues now because of a trend that is creeping into the case law as we find it in the circuit courts and in the state courts that supports a lawlessness in the way that police conduct themselves. The United States Supreme Court has previously stated that a citizen of this

country who is illegally arrested has the right to use force necessary to repel the arrest. Bad Elk v. United States, 177 U.S. 529, 533 (1900); United States v. DiRe, 332 U.S. 581, 594 (1947). But the right of the citizen to use force to the extent necessary to repel an unlawful arrest which would wrongfully deprive the citizen of his liberty has not been passed upon by the United States Supreme Court as a constitutional right that would be afforded a citizen through the Fourteenth Amendment of the federal constitution. Here, the right of Byrd to use a modicum of force necessary to repel the unlawful and violent acts of the police officers was protected by his first amendment rights of free speech (which are rendered meaningless if the police can arrest him forcibly for having exercised it), his Fourteenth and Fourth Amendment rights to be free and secure in his liberty, and his Fourteenth Amendment Due Process rights.

A consideration and issue is how the State

courts will protect the rights of individuals who are the victims of police brutality. It would be dishonest to deny that permitting police officers to arrest a citizen and permitting them to use force in doing so, even where the citizen isn't liable for an offense, and where there isn't reasonable cause to believe that he is, would, itself, foster police violence. It can reasonably be inferred that in the Byrd case, the police officers charged Mr. Byrd with a crime only to cover up their own crimes. After the police arrested him without good reason or cause, and beat him unconscious, inflicting serious injury, they charged Byrd with an assault to cover up their own conduct and put Byrd on the defensive. The conduct of the New Jersey courts on this case, permitting the police to act with such impunity, only encourages police violence. To the extent that Mr. Byrd, and citizens similarly situated, in fact have constitutional protection from unwarranted police violence,

this Court must articulate those constitutional protections lest State court conduct, such as that found in the Byrd case, shall continue to fan the flames of police misconduct.

If the court were to grant Certiorari in this case, the following constitutional protections would be articulated:

1. It is a violation of a citizens First and Fourteenth Amendment rights to free speech for a police officer to arrest a citizen, using any physical force, because the citizen exercised his right of free speech, and the State could not constitutionally prosecute that citizen where he or she uses reasonable resistance to protect his or her liberty or physical person;

2. It is a violation of the Fourteenth and Fourth Amendments of the United States Constitution for a State to prosecute a citizen for

assault on a police officer where an officer uses force to deprive him of his liberty and to effectuate an arrest through the use of force because the citizen used force necessary to repel the force of the police officers; and

3. It is a violation of the Fourteenth Amendment of the Federal Constitution for a State to prosecute and convict a citizen who acts simply to counter the misuse of State power.

There are additional policy and constitutional considerations that weigh heavily in favor of the court granting Certiorari in this case. Jeffrey Byrd simply resisted force that was used to arrest him. To permit a State to convict him for using force which was only of such degree or designed to repel or counter the force used by the police officers is to deny that he has a right to his freedom, his liberty, or to speak freely

and exercise his rights of free speech.

Mr. Byrd's actions were simply the implementation of his "right" to repel or resist the force of another. This right, like other rights, should never be dependent upon the decision as to whether circumstances make the exercise of it prudent or imprudent. The exercise of other constitutional rights, such as the right to remain silent or to be free from unlawful searches, does not depend on whether the circumstances make it prudent for the individual to assert their rights or not. Byrd's right to free speech, right to be protected in his liberty and the freedom of his person, and to be free from the misuse of State power should not be dependent upon the prudence of him exercising the right. It would be tantamount to saying that the police misconduct should be permitted.

It is important to note that tendency to defend oneself is an impulse rather than the result of careful consideration. Nowhere is

it more evident than in this particular case. The allegation that Byrd kicked a police officer came only after he was illegally arrested, illegally deprive of his liberty, forcefully detained and placed in handcuffs. The truth is, according to Byrd, that it followed his being struck in the face with a night stick. The only reason that the police officers could claim that the kick came before the night stick was because the State of New Jersey tolerated the illegal use of force by police officer in committing an illegal arrest in the first place. It is untenable to place a citizen in a position where he has to defend a kick and force a judge sitting without a jury to decide whether the police version or the citizen's version is true or not, when the arrest itself is admittedly illegal and the original force of placing him in handcuffs was illegal and unwarranted.

Perhaps, most important is that the freedom of a citizen in an open and free

democracy to refuse to obey a patently unlawful arrest is essential to the integrity of a government which purports to be one of laws, and the supporter of liberty, and not a government of men. Unless it is desirable to kill the impulse to resist arbitrary authority, the rule, protected with the authority of the constitution, such an illegal arrest is a provocation to resist, must remain fundamental. Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest, Jeffrey F. Ghant, 44 A.L.R. 3d. 1078.

The manner in which New Jersey construed its statutes in this particular case is unconstitutional as it deprived Jeffrey Byrd of his Fourteenth Amendment constitutional rights to 1) exercise his first amendment right to free speech, 2) his fourteenth amendment right to be secure in his liberty and 3) to be free from wrongful misuse of State power. For states to be permitted to convict the persons in the position of Jeffrey Byrd would be to

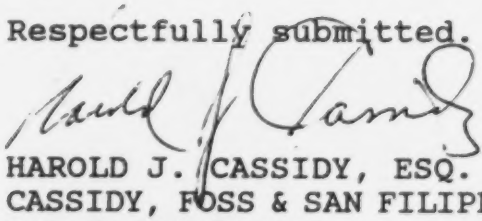
encourage police brutality, encourage unlawful arrests, and actually provoke outrageous arrests because the police officers believe that they can do so with relative impunity.

The Supreme Court of the United States should grant Certiorari in this case to rule that the statutes as construed by the New Jersey courts are unconstitutional as being violative of the Fourteenth Amendment rights of Mr. Byrd.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully urges that Certiorari be granted in this case.

Respectfully submitted.



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APPENDIX A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (MONMOUTH COUNTY)
APPEAL NO. 293-89

STATE OF NEW JERSEY	:	
	:	
vs.	:	On Appeal from the
	:	Conviction of
JEFFREY BYRD	:	
Defendant.	:	Rumson
	:	(Municipality)
	:	2C:12-1a Simple Assault
		(Offense)

DATE: 2/9/90 AFFIRMED XX
REVERSED
OTHER

IF REVERSED, REASONS:

s/MARK A SULLIVAN,JR., J.S.C.
JUDGE PRESIDING ON HEARING
OF APPEAL

NOTE:
Form to be completed in triplicate
One copy to be forwarded to Municipal Court
One copy to be placed in court jacket
One copy to be retained by Judge hearing appeal

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MONMOUTH
LAW DIVISION (CRIMINAL)

APPEAL NO. 293-89

THE STATE OF NEW JERSEY:

RESPONDENT :

vs. : JUDGMENT OF CONVICTION AND SENTENCE ON APPEAL

JEFFREY BYRD :

DEFENDANT-APPELLANT :

THIS MATTER HAVING BEEN BROUGHT BEFORE THE COURT BY DEFENDANT-APPELLANT ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED AGAINST HIM IN THE MUNICIPAL COURT OF THE BOROUGH OF RUMSON ON THE 30TH DAY OF AUGUST, 1989, AND JOAN HOWELL, LEGAL ASSISTANT, FOR THE COUNTY OF MONMOUTH APPEARING, AND THE DEFENDANT-APPELLANT IN PERSON AND BY COUNSEL APPEARING, KATHY SHEEDY, ESQUIRE;

IT IS ON THIS 9TH DAY OF FEBRUARY, 1990, ADJUDGED ON TRIAL DE NOVO THAT THE DEFENDANT-APPELLANT IS GUILTY OF THE DEFENSE(S) OF SIMPLE ASSAULT 2c:12-1(a) AS CHARGED, AND IS HEREBY

CONVICTED OF SAID OFFENSE(S).

IT IS ADJUDGED THAT THE DEFENDANT-APPELLANT IS HEREBY SENTENCED TO $350.00 FINE AND COURT COSTS OF $70.00 PAYABLE TO THE RUMSON BOROUGH MUNICIPAL COURT. DEFENDANT IS TO PAY $60.00 TO THE VIOLENT CRIMES COMPENSATION BOARD.

s/MARK A SULLIVAN, JR., J.S.C.

Dated:

CIS MUNICIPAL JUDGMENT

APPENDIX C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3654-89T5

STATE OF NEW JERSEY

Plaintiff-Respondent,

vs.

JEFFREY BYRD,

Defendant-Appellant.

Submitted November 8, 1990 - Decided December 10, 1990

Before Judge Gaulkin and Havey

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County

Cassidy, Foss & San Filippo, attorneys for appellant (Kathleen A. Sheedy on the brief).

John Kaye, Monmouth County Prosecutor, attorney for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel on the letter brief).

PER CURIAM

Defendant was convicted of simple assault, N.J.S.A. 2C:12-1a, in the Rumson Municipal

Court and again in the Law Division after his appeal de novo. He was fined $350, assessed $70 in court costs and a $60 VCCB penalty.

On appeal, defendant argues that the STate failed to sustain its burden of proving simple assault, and that the conviction must be set aside because the police officer arrested defendant for the defense, rather than issuing a summons.

Defendant was arrested by Sea Bright police officers for "disorderly conduct" because defendant had used offensive language outside of a local tavern. The municipal court and Law Division judge believed the testimony of the officers that while they were putting defendant in the police car after his arrest, he kicked one of the officers in the groin and butted him in the face.

Defendant argues that the force used by the police in arresting him was "unlawful" because the disorderly persons statute, N.J.S.A. 2C:33-2b, on which his original arrest

was based, had been declared unconstitutional approximately two years earlier. See State in the Interest of H.D., 206 N.J. Super. 58 (App. Div. 19-85). Defendant points to N.J.S.A. 2C:3-9a(2) for the proposition that the officers' ignorance of the law did not justify their use of "unlawful" force. Therefore, he reasons, the simple assault conviction must be reversed because he was justified in using force "against the continued use of unlawful force" employed by the police officers.

We reject defendant's argument. N.J.S.A. 2C:3-4b(1)(a) provides that the use of force is not justified to resist an arrest "which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest[.]" (Emphasis added). Here, the officers believed, albeit incorrectly, that defendant had committed a disorderly persons offense. It is undisputed that defendant knew

the officers were policemen and were making the arrest in the performance of their duties. Also, the municipal court and Law Division found that the police did not employ "unlawful" or excessive and unnecessary force in placing defendant under arrest. See State v. Mulvihill, 57 N.J> 151, 156 (1970). This finding is amply supported by the evidence. State v. Johnson, 42 N.J. 146, 162 (1964). Therefore, defendant's resistance was not justified.

We also reject defendant's claim that the conviction must fall because the police should have issued a summons, rather than having arrested him. A police officer is authorized "upon view" to apprehend and arrest any disorderly person or any person committing a breach of the peace. N.J.S.A. 40A:14-152. See also State v. Hurtado, 113 N.J. 1 (1988), rev'g on dissent, 219 N.J. Super, 12 (App.Div. 1987). Here, Officer Sorrentino testified that while he was at the scene of the arrest defendant

screamed out "f------ asshole." Since the offending conduct occurred in the officer's presence, he had a right to place defendant under arrest.

Affirmed.

APPENDIX D

SUPREME COURT OF NEW JERSEY
C-540 September Term 1990

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

JEFFREY BYRD,

Defendant-Petitioner.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-3654-89T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied without costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 5th day of February, 1991.

s/Stephen Townsend

EXHIBIT E

take them off, if you feel more comfortable.

MR. CASSIDY: Judge, with respect to the complaint that is pending against Mr. Byrd under 2C:33-2, I'd move to dismiss that particular complaint because it has been cited under the portion of the statute which has been previously declared unconstitutional --

THE COURT: All right, would you get me my statute book, please, Madam Clerk? Oh, here it is. I'm sorry. Okay, go ahead.

MR. CASSIDY: Judge, that particular statute 2C:32-2A and B, -- A is the section that talks about fighting words. He's not charged under A. Previously, there's been case law in this State that would indicate that words to , as alleged by this police officer to a police officer would not be actionable under A, in any event.

But what is alleged by the State, is that the defendant is guilty of a B violation , the offensive language. That particular statute

(sic) has been declared unconstitutional in our jurisdiction by a release of December 5, 1985, in the matter of State, State, In the matter of H.D., 206 NJ Super, 58 (App. Div. 1985). That opinion was the first opinion that we have construing the new code but is consistent with prior case law on the same topic.

So, that to the extent that the State is moving under that statute, it is without authority. And I think it's appropriate and actually, it's mandatory that it be dismissed on motion before the case.

THE COURT: All right, do you have that report with you or the photocopy of that text?

MR. CASSIDY: The opinion, Judge?

THE COURT: Yes.

MR. CASSIDY: I'm going to hand you a photocopy of that opinion.

THE COURT: FINE.

MR. CASSIDY: May I approach the bench?

THE COURT: Indeed. Please do. All right. Mr. Prosecutor, your response.

MR. FIORINO: Judge, I'm not aware of the case. The case will speak for itself, I guess. Just so Your Honor is clear, the charge is not -- the charge is that there was a yelling of offensive language in a public place in the vicinity of other patrons in the lot. NOt that it was necessarily offensive to the police officer, but that it was yelled loudly in a public place in the, as I said, in the vicinity of other patrons nearby.

MR. CASSIDY: We understand that be the allegation but it doesn't save the State's complaint.

(Pause in proceedings)

THE COURT: All right. The case cited by counsel, I am somewhat familiar with, having recently decided a matter about a month ago, a similar proposition. The language that I am looking for is found in 206 NJ Super, 61, in which the last sentence of the opinion which is rendered by the Appellate Division speaking through Judge Antell states, "It follows that

therefore there's no valid statutory authority for prosecutions based upon the public use of coarse (sic) or abusive language which does not go beyond offending the sensibilities of the listener".

All right? Now. The complaint that is charged, that is set forth, says that within the jurisdiction of this court, did commit the act of disorderly conduct by yelling offensive language in a public parking lot. Was said offensive language could be heard by the patrons of the Trade Winds Bar in violation of said statute (sic). There's no assertion here, no allegation of the complaint that there was anything involved that would go beyond offending sensibilities.

Accordingly, I will dismiss what it's my understanding would be the remnants of complaint number 963270.

Now, you will be putting the citation of the case on the front complaint so that if there is any law

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Attorneys for Petitioner

JEFFREY BYRD, Petitioner vs. THE STATE OF NEW JERSEY, Respondent.	IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1991 NO. CERTIFICATION OF MAILING

I, HAROLD J. CASSIDY, of full age, certify and say:

1. I am an attorney-at-law of the State of New Jersey with the firm of Cassidy, Foss & San Filippo, and responsible for the handling of this matter.

2. On May 7, 1991, this office mailed out by regular mail a copy of the Petition for Writ of Certiorari and Appendix in Support of the Petition to John Kaye, Prosecutor of

Monmouth County, 3rd Floor, East Wing, Freehold, N.J. 07728-1261, telephone number (908) 431-7160. On May 14, 1991, two additional copies of the Petition for Writ of Certiorari and Appendix in Support of the Petition were mailed to John Kaye, Prosecutor of Monmouth County, at the above address.

3. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

HAROLD J. CASSIDY

DATED: May 29, 1991